Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 84-894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

THOMAS FOGEL,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

MARK W. SOLOCK*
GLENN E. GUTSCHE
221 North LaSalle Street
Suite 1938
Chicago, Illinois 60601
(312) 782-6634
Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

1.

Whether this case involves an issue also presented in the pending case of *Oklahoma v. Castleberry* (No. 83-2126, cert. granted, November 5, 1984)?

2.

Whether this case involves a substantial constitutional question relating to the automobile exception to the search warrant requirement?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I.	
THIS CASE DOES NOT PRESENT AN ISSUE ALSO INVOLVED IN *OKLAHOMA v. CASTLEBERRY*, NOW PENDING BEFORE THIS COURT	4
II.	
THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION RELATING TO THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT	8
CONCLUSION	13
APPENDIX	
COMPLAINT FOR SEARCH WARRANT	1a
SEARCH WARRANT	3a

TABLE OF AUTHORITIES

Cases

Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) 6

Cady v. Dombrowski, 413 U.S. 433, 96 S.Ct. 2523, 37 L.Ed.2d 706 (1973) 8

Caldwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) 8, 10

Castleberry v. State, 678 P.2d 720 (Okla. Crim. 1984) 5, 6

Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980) 9

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 9

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 10

Michigan v. Thomas, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982) 9, 10

Oklahoma v. Castleberry, (No. 83-2126, *cert. granted*, Nov. 5, 1984) 4

United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) 6

United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 72 L.Ed.2d 572 (1982) 6, 9, 10

Statute

Title 28 U.S.C. Rule 17(c) 10

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Thomas Fogel, respectfully prays that the Petition for a Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, entered on June 29, 1984, be denied.

JURISDICTION

Petitioner adequately sets forth the jurisdiction of this Court.

CONSTITUTIONAL PROVISION AT ISSUE

Petitioner adequately sets forth the constitutional provision at issue.

STATEMENT OF THE CASE

On December 27, 1982, at 9:15 p.m. City of Chicago Police Officer Robert Smith obtained a search warrant to search Thomas Fogel's person and his home which was located at 625 North Laramie, Glenview, Illinois. (R. 69)

The complaint for search warrant contained certain information that a confidential informant had related to Chicago Police Officer Robert Smith.

The complaint for search warrant indicated that on December 27, 1982 the confidential informant told Officer Smith that on that date he was in the company of the respondent. (R. 70)

The informant and the respondent went to the respondent's single family residence located at 625 North Laramie, Glenview, Illinois. (R. 70) After they arrived the respondent asked the informant to help him carry some bags into the respondent's home. (R. 70) The informant and the respondent then each took a large plastic bag from the trunk of a car and carried it into respondent's house. (R. 70-71) There is no information contained within the complaint for search warrant describing this automobile or even mentioning that it was owned by respondent. (R. 70-71)

Once inside the house, the informant removed some crushed green plant from one of the large plastic bags, smoked it, and received a "marijuana high." (R. 71) There is no information contained in the complaint for search warrant indicating that the two large plastic bags were ever taken from respondent's home. (R. 71)

On December 28, 1982 at approximately 3:00 p.m. Officer Smith and three fellow officers arrived at the respondent's home to execute the search warrant. (R. 16) As they arrived at the respondent's residence, the officers noticed a lone van parked in the driveway leading to a two-car garage at that address. (R. 17)

Respondent was not present at his home when the police arrived. An adult male was present who denied the officers entry. The police then forcibly entered the residence. (R. 18-19)

The officers searched the respondent's residence for an hour and a half; no contraband was uncovered. (R. 20)

As the officers were concluding their search, the respondent and his wife entered the residence. (R. 21-22)

Respondent's briefcase was searched and marijuana and cocaine were recovered. (R. 22-23) The officers searched the purse of the respondent's wife and recovered $2,865. (R. 28)

Officer Smith then took some car keys from respondent and used those keys to open a 1978 Mercury that was parked in the driveway, approximately 20-25 feet from the front door of respondent's residence. The car had not been present when the police officers arrived to execute the search warrant. (R. 12, 21-22, 25) Officer Smith searched the interior of the automobile and did not find any contraband. (R. 12) He then opened the trunk of the automobile

and recovered two large plastic bags filled with marijuana. (R. 12, 25) Ten to fifteen minutes had elapsed from the time the respondent was searched until the trunk of the 1978 Mercury was searched. (R. 30-31) It was only after the 1978 Mercury was searched that the police learned that the car was registered to the respondent and his wife. (R. 26)

The trial court suppressed the marijuana recovered from the trunk of the 1978 Mercury ruling, in part, that the police did not have probable cause to search the car. (R. 48-49) The State appealed from that decision.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT AN ISSUE ALSO INVOLVED IN *OKLAHOMA v. CASTLEBERRY*, NOW PENDING BEFORE THIS COURT.

Contrary to the petitioner's assertion, the issue in the instant cause does not involve the same issues presented in *Oklahoma v. Castleberry* (No. 83-2126, *cert. granted*, Nov. 5, 1984). Moreover, petitioner has misstated one of the issues involved in *Castleberry*.

In *Castleberry*, Oklahoma City Police Officer R.D. Taylor received an anonymous telephone tip from a previously unknown confidential informant. The informant told Officer Taylor that two men, one named Castleberry, were staying in a particular room in a particular motel, that they were driving a blue Thunderbird with Florida license plates and that they were carrying narcotics in

blue suitcases. The informant also provided physical descriptions of the two men.

Officer Taylor immediately proceeded to the location of the motel, observed a vehicle matching the description of the vehicle given him by the informant, and ascertained that Castleberry resided at the motel.

Several minutes later, Officer Taylor observed two individuals emerge from the named room at the motel and place several suitcases in the trunk of the described car. The suitcases also matched the informant's prior description.

Officer Taylor then announced his office and attempted to restrain the two men. One obeyed, but Castleberry closed the lid of the trunk, and threw a small white object into the car. Castleberry also shut the car door and locked it. Another police officer arrived, and, using the keys, retrieved the white object (a Band-Aid box) from the interior of the car, and retrieved the suitcase from the trunk of the car. The Band-Aid box and the suitcases were searched and narcotics were found in each. *Castleberry v. State*, 678 P.2d 720, 722 (Okla. Crim. 1984). The trial court denied the defendants' motion to suppress, but on appeal the Oklahoma Court of Criminal Appeals reversed. That court held that the search was not justified as incident to a lawful arrest. *Castleberry v. State*, 678 P.2d 720, 723 (Okla. Crim. 1984). The petitioner, in the instant cause, does not attempt to justify the search of the 1978 Mercury under the search incident to lawful arrest theory.

The second rationale utilized by the Oklahoma Court of Criminal Appeals is misstated by petitioner when it states that "[t]he Oklahoma Court of Criminal Appeals ruled that

a warrant had been necessary to justify a search of the automobile." (Petition, page 10.)

The Oklahoma Court of Criminal Appeals held that a warrant was necessary to justify a search of the containers seized from the automobile. The Oklahoma Court of Criminal Appeals ruled that *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) governed the fact situation rather than *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

> The case at bar clearly falls within the *Chadwick-Sanders* line of cases. The suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw into the car. Accordingly, we hold that the motion to suppress was erroneously overruled. The officers should have detained the containers until a search warrant had been obtained. *Castleberry, supra* at 724.

Thus, the issue presented to this Court by *Castleberry* involves an analysis of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) and its interplay with the so-called container cases, *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The fact that the car in Castleberry was parked is immaterial to the issues in that case.

The crucial issues and facts in *Castleberry* and the instant case are far more different than similar.

In *Castleberry* the police receive a detailed description of the defendants' automobile as well as the containers in which the two defendants are carrying narcotics. The police officer goes immediately to the scene and observes

the described auto and the described containers being placed in that vehicle. His opening of the interior and the trunk of that vehicle in order to seize the containers are not at issue. It is only the opening of the containers themselves, without a search warrant, that is at issue.

By way of comparison, the officer in the instant case, receives information from an informant relating to the respondent and an automobile used to transport contraband. The automobile is not described in any manner. He cannot be sure that the automobile is owned by the respondent, as opposed to being borrowed or rented (or even owned by the informant.) There is no indication that he knows how many automobiles the respondent may own or rent. He is not even told who was driving the automobile at the time the narcotics were transported.

The officer is then told that 2 bags of marijuana are removed from the trunk of the automobile and taken by the respondent into his house. The informant never mentions seeing the bags ever leaving the house, much less being placed back in an automobile.

The police arrive at the respondent's house at least eighteen hours after they receive this information. They cannot verify, through their personal observation, that the respondent arrives in the same vehicle previously mentioned by the informant, because they have no description of the prior vehicle. They do not even observe the respondent arrive in the 1978 Mercury, much less place anything in that vehicle.

The primary issue in the instant case involves probable cause. Did the police have probable cause to open and search the 1978 Mercury parked in the respondent's driveway? *See* Argument II, *supra.* This issue is distinct from the issues in *Castleberry.* The secondary issue in the in-

stant cause involves whether the police needed a search warrant in order to open and search the 1978 Mercury. Because this case has been properly decided on the first issue (probable cause) this Court need not evaluate the second issue (need for search warrant). *See* Argument II, *supra*. As such, this Court should not accept the instant petition on the basis of *Castleberry*.

II.

THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION RELATING TO THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

The petitioner manufactures an issue when it states that this cause should be accepted by this Honorable Court in order to determine whether the automobile exception to the search warrant requirement applies to a parked automobile. (Petition, page 12).

Initially, it should be noted that this Court's case law makes it clear that, under some circumstances, the automobile exception to the search warrant requirement does apply to parked vehicles. *See, e.g., Caldwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 96 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Thus, this Court does not have to accept this Petition in order to establish a rule of law since that rule of law has already been established through prior case law.

Most importantly, however, it is clear that this petition is not the proper one for this Court to accept in order to analyze the automobile exception to the search warrant requirement. The reason for this is that the facts of this case indicate that the police lacked probable cause

to search the respondent's car. The trial judge ruled that the police lacked probable cause to search the vehicle. (R. 48-49) The Illinois Appellate Court ruled that the police lacked probable cause to search the vehicle. (Appellate Court Opinion; See Petitioner's Appendix, page 6a).

When one analyzes the decisions of this Court involving the automobile exception to the search warrant requirement it is clear that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). As stated by this Court in *United States v. Ross*, 456 U.S. 798, 807-808, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982):

> In defining the nature of this "exception" to the general rule that '[i]n cases where the securing of a warrant is reasonably practicable, it must be used,' *id.*, at 156, 69 L.Ed.2d 543, 45 S.Ct. 280, the Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains contraband.
>
> . . . . .
>
> Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers.

In every one of the cases cited by the petitioner under the automobile exception to the search warrant requirement, the police had probable cause or other lawful justification to search the vehicles in question without search warrants. Moreover, the existence of probable cause was not an issue that this Court was asked to decide.

For instance, in *Colorado v. Bannister*, 449 U.S. 1, 3, 66 L.Ed.2d 1, 101 S.Ct. 42 "[p]robable cause . . . is self-evident." *See, e.g., Michigan v. Thomas*, 458 U.S. 259,

102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Caldwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

It is respectfully submitted that it is not appropriate for this Court to grant this petition in that the petitioner is requesting that this Court review the determination of a state trial court and a state appellate court pertaining to whether probable cause existed, given the facts of this individual case. Such a review does not constitute an important question of federal law. *See* Title 28 U.S.C. Rule 17(c). *Compare Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Assuming that this Court accepts this Petition in order to review whether probable cause existed, then respondent submits that the police did not have probable cause to believe any contraband was in the 1978 Mercury.

An analysis of the petitioner's case for probable cause indicates the total lack of probable cause.

> The fact that the officers did obtain a search warrant for respondent's house and person shows that the officers were not trying to evade the search warrant requirement. Moreover, the officers were justified in not seeking authority to search respondent's automobile at the time they applied for the warrant. Although the informant had seen respondent removing a large quantity of marijuana from the car the previous day, when the officers applied for the warrant they had no information indicating that any contraband was still in the vehicle. (R. 70-71) Also, neither the affidavit nor anything else in the record indicates that the informant supplied a description of the automobile. (R. 70-71) The application for the warrant had to give both a specific description of the

> place to be searched and information indicating that evidence was presently to be found there. Ill. Rev. Stat. 1971, ch. 38, sec. 108-1. When Officer Smith applied for a search warrant, such information was not available concerning respondent's automobile.
>
> But after respondent was searched and placed under arrest, there was probable cause to search his vehicle. The large quantity of marijuana seen by the informant had not been found in the house. The previous day respondent had transported the marijuana to the house in his car, and respondent had just arrived at the house in his car again. Smaller quantities of cocaine and marijuana were found on respondent's person, and several thousand dollars were found in his wife's purse. Thus the officers searched respondent's automobile as soon as they acquired probable cause to believe that it contained contraband.
>
> Here the officers, after they acquired probable cause, searched an automobile which had just been parked and left by respondent. This Court should accept jurisdiction in order to resolve the important question of whether the automobile exception to the search warrant requirement applies to such searches.

Petition, pages 19-21.

First, the petitioner states that "the informant had seen respondent moving a large quantity of marijuana from *the* car the previous day . . ." (emphasis added) (Petition, page 19) This is an incorrect recital of the facts. The complaint for search warrant indicates that the respondent removed a quantity of marijuana from a car. It was never stated that the car was respondent's car, much less the 1978 Mercury eventually searched. Petitioner never entertains the notion that people own more than one car (respondent's house had a two-car garage) or that people rent or borrow cars.

The petitioner is correct when it states that the police officers did not have any information to indicate any contraband was still in the vehicle at the time application was made for the search warrant. (Petition, page 20)

According to petitioner, two factors give rise to probable cause to search the 1978 Mercury. First, respondent was searched in the house and narcotics were found in his briefcase. Secondly, no large quantity of marijuana was found in the house.

How these two factors give rise to probable cause to search the 1978 Mercury is never explained. Presumably, in eighteen hours time, the marijuana could have been taken to many different places in many different vehicles. The police have no information indicating that the 1978 Mercury is the same car previously mentioned by the informant. At the time that the police search the 1978 Mercury they have not even verified that the car is the respondent's. They did not even see the respondent and his wife get out of the 1978 Mercury before they enter the house. No one sees any large plastic bags ever being placed in the Mercury.

In conclusion, it is clear that the police did not have probable cause to search the 1978 Mercury. Based on the evidence presented, the decisions of the courts below that no probable cause existed to search the 1978 Mercury were not clearly erroneous. The petition for certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the respondent respectfully submits that the Petition for a Writ of Certiorari not be granted.

Respectfully submitted,

MARK W. SOLOCK*
GLENN E. GUTSCHE
221 North LaSalle Street
Suite 1938
Chicago, Illinois 60601
(312) 782-6634

Attorneys for Respondent

* Counsel of Record

APPENDIX

State of Illinois
County of Cook—ss.

The Circuit Court
of Cook County

COMPLAINT FOR SEARCH WARRANT

[Filed December 30, 1982]

Robert E. Smith #15578 Complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of "Tommy" Male/White Approx.30yrs. 5'8 130lbs. Brn.hair and 625 N. Laramie House Glenview, CookCounty,Ill. and seize the following instruments, articles and things: Marijuana: to wit Cannabis Sativa & Proof of Residency which have been used in the commission of, or which constitute evidence of the offense of Possession of Marijuana.

Complainant says that he has probable cause to believe, and based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

I, Robert E. Smith a Police Officer for the City of Chicago had a conversation with a reliable informant relative to marijuana on 27 Dec 1982. This informant related to me that on 27 Dec 1982 this informant was in the company of a male white subject known to this informant as Tommy. This informant described Tommy as a male white approx.30yrs. 5'8 130lbs. with brown hair. The informant related that while in the company of Tommy, Tommy and this informant went to the location of 625 N. Laramie Glenview,Cook County,Ill. were the informant related is a single dwelling house. The informant related that upon arriving at 625 N. Laramie Glenview,Cook County,Ill. Tommy told the informant that this is were I live. At this time the informant related that Tommy told the informant to go to the trunk of the auto to help him carry some bags into the house. At this time the informant related that Tommy and this informant both carried a large green plastic bag into this house located

at 625 N. Laramie Glenview,Cook County,Ill. The informant related that Tommy took keys from his coat pocket and unlocked the frontdoor of this residence at which time Tommy along with this informant entered into this house. Once inside this house the informant related that upon looking into these two green plastic bags the informant found them to contain several pounds of crushed plant. The informant related that while looking into these two green plastic bags Tommy told the informant that this was high grade reefer. With this the informant related that this informant took a small quantity of this crushed plant from each green plastic bag and smoked it at which time this informant related that a marijuana high was received. This informant knows a marijuana high in that this informant has been smoking marijuana for approx.two years on a regular basis up to the current date. The informant related that after a period of time this informant left Tommy's house at 625 N. Laramie Glenview,Cook County,Ill. at which time this informant related that Tommy had under his control two green plastic bags of marijuana that this informant observed and smoked a small quantity from. I have known this informant for approx. twelve months and since November of 1982 alone this informant has given me information on three separate occasions at which time cannabis and or controlled substance were recovered on each occasion with a positive lab report on two occasions and a positive field test on the third occasion. A lab report on the third occasion hasn't of yet been received. Arrests were made on all occasions.

/s/ Robert E. Smith
Complainant

Subscribed and sworn to before me on 12-27-82.

/s/ [Illegible]
Judge

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT
[Filed December 30, 1982]

On this day Robert E. Smith #15578, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search "Tommy" Male/White Approx.30yrs. 5'8 130lbs. Brn.hair 625 N. Laramie House Glenview,Cook County,Ill. and seize Marijuana: to wit Cannabis Sativa & Proof of Residency which have been used in the commission of or which constitutes evidence of the offense of Possession of Marijuana. I further commend that a return of anything so seized shall be made without necessary delay before me or before Judge Zelezinski-Branch #25, or before any court of competent jurisdiction.

/s/ [Illegible]
Judge

Time and date of issuance 9:15 P.M. 12-27-82

I did execute this warrant within 96 hours from the time of issuance and is hereby returned to the court and executed.

/s/ Robert E. Smith
Officer

Date: 28 Dec 92